IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

v.

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

INTRODUCTION

For purposes of this brief, respondent hereby adopts the material in the petitioner's brief under the following headings: "OPINION BELOW," "JURISDICTION," and "STATEMENT OF THE CASE."

QUESTIONS PRESENTED

1. Must verbal expression of consent in response to a police request to search an automobile be substantiated by demonstration that consent was given with knowledge that it could be withheld?

2. Should federal habeas corpus be available to state prisoners seeking to set aside their convictions by raising search and seizure issues?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment and Section 1 of the Fourteenth Amendment, U.S. Const.; The Habeas Corpus Act of 1867 (Act. of Feb. 5, 1867, Ch. 28, § 1, 14 Stat 385); 28 U.S.C. § 1257; and 28 U.S.C. § 2254. These provisions are reprinted in Appendix A, *infra*.

SUMMARY OF ARGUMENT

The two issues presented in this case go to the very heart of our system of criminal procedure. This Court has long held that an essential element of a waiver of constitutional rights is whether the individual knew he was relinquishing such rights. Without such knowledge, the individual could not be deemed to have made a meaningful decision to forego his constitutional protections. California has sought to establish a rule to the effect that an inquiry into whether knowledge of the constitutional right was present is irrelevant when an individual "consents" to a warrantless search, thereby relinquishing his Fourth Amendment right to resist the

search. This rule is contrary to the fundamental constitutional criteria announced by this Court to which all other courts must adhere, and should be held unconstitutional.

The second issue is whether exclusionary rule questions should be cognizable on federal habeas corpus when raised by state prisoners. Federal habeas corpus has proven to be the most effective remedy for ensuring full implementation of fundamental constitutional protections, and it has guaranteed fair and equal treatment for all citizens seeking to raise federal constitutional claims. Three years ago this Court considered and rejected arguments aimed at limiting the availability of federal habeas corpus for federal prisoners seeking to raise exclusionary rule questions. In that decision this Court stated that such limitations are also inappropriate with respect to state prisoners. *Kaufman v. United States*, 394 U.S. 217, 225 (1969). The justification for granting to state prisoners full access to federal habeas corpus in connection with search and seizure claims is even stronger than that applicable to federal prisoners, since, unlike federal prisoners, state prisoners may not have an opportunity to have a federal court review their federal constitutional claims until a petition for federal habeas corpus has been filed. The principle enunciated in *Kaufman v. United States* that state prisoners may raise search and seizure claims on federal habeas corpus has helped to guarantee consistent enforcement of the Fourth Amendment's protections, and it should be affirmed in this case.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING ALL EVIDENCE RESULTING FROM THE SEARCH OF THE 1958 FORD WITHOUT DETERMINING WHETHER ALCALA KNEW OF HIS CONSTITUTIONAL RIGHT TO RESIST THE WARRANTLESS SEARCH

A. Introduction

The first question before this Court is clear: Can California adopt a rule of law regarding the waiver of fundamental constitutional rights that does not meet the minimum criteria for such waivers heretofore set forth by this Court? The record discloses that, at approximately 2:40 A.M., a 1958 Ford automobile carrying Joe Alcala and five other occupants was stopped by a police car. Later, after two additional police cars arrived on the scene, a police officer asked Alcala if he could search the Ford. Alcala was not advised that he could refuse to permit the search, nor was any evidence introduced at the trial to show that Alcala had such knowledge. Rather, the California courts applied their presumption that:

> "When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed." *People v. MacIntosh*, 264 Cal. App. 2d 701, 705-06, 70 Cal. Rptr. 667 (1968).

By applying the above stated presumption, the California courts sought to make Alcala's awareness of his constitutional rights irrelevant; if he consented to the search, he was *presumed* to know that he did not have to consent. The following sections of this brief will demonstrate that such a rule is unconstitutional, and that the

Court of Appeal for the Ninth Circuit properly remanded the case to the United States District Court to determine whether Alcala knew of his constitutional right to resist the search. *Bustamonte v. Schneckloth*, 448 F.2d 699 (9th Cir. 1971).

B. The Fourth Amendment Applies To The States, And State Courts Must Apply Certain Minimum Constitutional Standards For Determining The Validity Of A Search And Seizure.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Through countless decisions, this Court has emphasized that the purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *See, e.g., Ker v. California*, 374 U.S. 23, 30-33 (1963); *Mapp v. Ohio*, 367 U.S. 643, 646-50 (1961); *Byars v. United States*, 273 U.S. 28, 33-34 (1927); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920); *Weeks v. United States*, 232 U.S. 383, 389-92 (1914); *Boyd v. U.S.*, 116 U.S. 616, 624-30 (1886). As this Court stated in *Gouled v. United States*, 255 U.S. 298, 303-04 (1921):

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court [citing cases] have declared the importance to

political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. [the Fourth and Fifth]"

In *Mapp v. Ohio, supra*, this Court overruled its earlier decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), and held that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state courts. The Court stated that to permit such evidence to be admitted in state courts, while at the same time holding to the position that the Fourth Amendment is applicable to the states, would make the Fourth Amendment little more than an "empty promise." 367 U.S. at 660.

Two years later, in *Ker v. California, supra*, it was held that state court determinations of reasonableness must be consistent with federal constitutional guarantees. Although *Ker* made it clear that *Mapp* did not establish United States Supreme Court supervisory authority over the state courts; *Ker* made it equally clear that state courts must apply certain basic criteria to determine the reasonableness of searches and seizures:

"While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental–*i.e.*, constitutional–criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforce-

ment' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." 374 U.S. at 34.

The Fourth Amendment and the decisions of this Court both stress that the primary source of governmental authority to conduct searches and seizures must be through the obtaining of validly issued search warrants. *See, e.g., Katz v. U.S.*, 389 U.S. 347, 357 (1967); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Agnello v. United States*, 269 U.S. 20, 33 (1925). Last term, this Court stated that "the most basic constitutional rule in this area" is that searches conducted without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment–subject only "to a few specifically established and well-delineated exceptions." These exceptions are "jealously and carefully drawn" and there must be a showing by those who seek the exception that "the exigencies of the situation make that course imperative." *Coolidge v. New Hampshire*, 403 U.S 443, 454-55 (1971) citing *Katz v. United States, supra*, 389 U.S. at 357; *Jones v. United States*, 357 U.S. 493, 499 (1958) and *McDonald v. United States*, 335 U.S. 451, 456 (1948). One of these "jealously and carefully drawn" exceptions to the warrant requirement has been established for instances in which an individual consents to a warrantless search, thereby waiving his constitutional right to resist the search.

The petitioners brief ("Pet. Br.") suggests that since the Fourth Amendment only bars "unreasonable searches and seizures," uncoerced consent searches should be deemed constitutional, i.e., "reasonable," even if the

consenting person had no idea that he could assert a constitutional right to resist the search (Pet. Br. 9-10). This Court has repeatedly emphasized, however, that those precisely defined and well-delineated exceptions to the warrant requirement are to be strictly construed to prevent the gradual evaporation of Fourth Amendment protections:

> "It has been repeatedly decided that these Amendments [the Fourth and Fifth] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States, supra*, 255 U.S. at 304. *See also, Chimel v. United States*, 395 U.S. 752, 764-65 (1969); *Camara v. Municipal Court, supra*, 387 U.S. at 528-29.

Decisions as to what is "reasonable" under the Fourth Amendment are not made in a vacuum, for they must meet the basic constitutional tests applicable to all courts, whether state or federal. *Ker v. California, supra*, 374 U.S. at 33-34 (1963). Thus, California's rule that the consenting person's knowledge of the rights he is relinquishing is irrelevant, must conform to the "fundamental—*i.e.*, constitutional—criteria established by this Court . . ." *Ker v. California, supra*, 374 U.S. at 34.

C. In Order To Establish That An Individual Has Waived His Fourth Amendment Rights By Consenting To A Warrantless Search, It Must Be Determined That The Waiver Was Knowingly And Intelligently Made.

The basic standard for determining whether an individual has waived a constitutional right was set forth in the leading case of *Johnson v. Zerbst*, 304 U.S. 458 (1938). In that case, this Court stated that such a waiver requires that there be "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464. This standard is a necessary corollary of the grant of the constitutional right itself, for without the requirement that knowledge of the right be demonstrated before a waiver is deemed valid, the constitutional protection is reduced to being the special province of the sophisticated, the knowledgeable and the privileged. The requirement of knowledge serves the essential function of guaranteeing that all persons have the opportunity to make a meaningful choice before relinquishing their constitutional protections.

Since the decision in *Johnson v. Zerbst* was rendered in 1938, there have been numerous statements that a valid consent to a warrantless search constitutes a waiver of the Fourth Amendment protections. Thus, the consenting individual must understand what he is doing, the consent must be free from coercion, and the decision to consent must be knowingly and intelligently made. *See, e.g., Johnson v. United States*, 333 U.S. 10 (1948) ("[The consent to the search] was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional

right." 333 U.S. at 13); *United States v. Curiale*, 414 F.2d 744, 746-47 (2d Cir. 1969), *cert. denied*, 396 U.S. 959 (1969); *Pendleton v. Nelson*, 404 F.2d 1074, 1076 (9th Cir. 1968); *United States v. Miller*, 395 F.2d 116, 118 (7th Cir. 1968), *cert. denied*, 393 U.S. 846 (1968); *Rosenthall v. Henderson*, 389 F.2d 514, 515-16 (6th Cir. 1968); *Wren v. United States*, 352 F.2d 617, 618 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); *Simmons v. Bomar*, 349 F.2d 365, 366 (6th Cir. 1965); *United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *Judd v. United States*, 190 F.2d 649, 650-51 (D.C. Cir. 1951); *cf. Zap v. United States*, 328 U.S. 624 (1946).

The decisions of the Court of Appeals for the Ninth Circuit which were cited as authority for its holding in the pending case are clearly in line with the requirement that a waiver of Fourth Amendment rights can only be made if the individual knows of the rights he is relinquishing. The first of these cases was *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966). In that case U.S. Customs agents at Los Angeles International Airport asked the suspect if they could search her luggage. The suspect allegedly consented, but said that her bags were locked and that the keys were in New York. The agents found the bags to be unlocked, opened them and discovered marijuana. The Court ruled that Cipres did not effectively waive her Fourth Amendment rights:

> "But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context,

means the 'intentional relinquishment of a known right or privilege.' (citing *Johnson v. Zerbst, supra.*) Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld.

* * * *

"The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did." 343 F.2d at 97-98.

The second major case on which the lower court relied was *Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968). Here, the court set out a four category test which it held must be satisfied before a consent search will be deemed valid:

"[T]he trial court determination that there had been an effective waiver cannot stand unless there is implicit therein a finding of fact that, under the described circumstances, the words used by [the suspect] reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) [the suspect] knew may be freely and effectively withheld." 391 F.2d at 398.

The court found that the fourth element had not been established, and remanded the case for an inquiry into that issue.

In contrast to the criteria set forth in the cases discussed above, the California rule regarding consent searches disregards the individual's knowledge of his rights, and focuses solely on whether his consent was the

product of police coercion. The individual's knowledge is presumed from the fact that he consented to the search. *People v. Bustamonte*, 270 Cal. App. 2d 648, 653, 76 Cal. Rptr. 17 (1969).[1] The premise behind this narrow view of the consent search is the California courts' conception that the *only* purpose served by excluding illegally seized evidence is the deterrence of improper police conduct. *People v. Gorg*, 45 Cal. 2d 776, 783, 291 P.2d 469 (1955); *People v. Cahan*, 44 Cal.2d 434, 446-47, 282 P.2d 905 (1955) Manwaring, *California and the Fourth Amendment*, 16 *Stan. L. Rev.* 318, 334-36 (1964). This unduly narrow premise is contrary to the general rule that good faith on the part of the police will not validate an illegal serach. *e.g., Cipres v. United States, supra*, 343 F.2d at 98.

The waiver criteria established by this Court and applied by the lower courts are not based solely upon the premise that illegal police conduct should be deterred by excluding evidence seized as a result of police coercion, *see, Elkins v. United States*, 364 U.S. 206, 217 (1960), but also on the duty of the courts to protect the rights of the citizen. *Cipres v. United States, supra*, 343 F.2d at 98; *see also, Harrison v. United States*, 392 U.S. 219, 224 n. 10 (1968); *Lee v. Florida*, 392 U.S. 378, 385-86 (1968); *Elkins v. United States*, 364 U.S. 206, 222-23

[1] In other contexts (consideration of California's claim and delivery law), the California Supreme Court has recognized that the waiver of Fourth Amendment rights by virtue of a consent to a warrantless search must constitute an intentional relinquishment or abandonment of a known right or privilege, and that the burden is on the government to show "by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given." *Blair v. Pitchess*, 5 Cal.3d 258, 274-75, 96 Cal.Rptr. 42 (1971). However, the California courts apparently do not apply this rule in cases such as the one now before this Court. (*See* Pet.Br. at 8-14).

(1960). By focusing solely on the former premise, California has adopted a waiver test which is not consistent with federal constitutional guarantees.

D. The Petitioner's Arguments As To Why It Should Be Irrelevant Whether The Consenting Person Knew Of His Fourth Amendment Rights Do Not Affect The Result That California's Rule Is Unconstitutional.

The petitioner's brief raises a number of arguments in an attempt to justify California's refusal to comply with the constitutional criteria for a valid consent search. The first of these arguments is that California's rule makes consent a factual question which is to be presumed correct under 28 U.S.C. § 2254(1) (Pet. Br. 12-13). The issue before this Court, however, is the propriety of the California rule itself, rather than a finding of fact in a specific case. It is California's rule of law that makes the factual inquiry irrelevant; thus, it is clear that the applicant can question the state court proceedings because "the material facts were not adequately developed at the state court hearing. . ." 28 U.S.C. § 2254(d)(3). Only when the consenting person's knowledge of his right to resist the search is acknowledged to be an essential element of the consent's validity can the California courts claim that they have made an appropriate finding of fact. To reject the requirement of knowledge is to reject the possibility that such a finding of fact has been made. In addition, it has repeatedly been stated that a waiver affecting federal constitutional rights is a federal question, and that a state court finding does not bar an independent determination of that question in federal court in a habeas corpus proceeding. E.g., *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Rice v. Olson*, 324 U.S. 786 (1945); *Montana v. Tomich*, 332 F.2d 987, 990 (9th Cir. 1964).

The petitioner's second argument is that requiring a finding that the consenting person had knowledge of his rights will make third party consent searches impossible (Pet. Br. 14-17). The initial response to this argument is that, to the extent that law enforcement officers seek to conduct searches without first obtaining a warrant, they must come within the narrow permissible exceptions to the warrant requirement.

> "It is fundamental that the doctrine which recognizes the validity of a third party's consent to a search must be applied guardedly to prevent erosion of the protection of the Fourth Amendment, since it makes no requirement of the existence of probable cause for the search and does not constitute an exception based on necessity." *United States Ex Rel Cabey v. Mazurkiewicz*, 431 F.2d 839, 843 (3d Cir. 1970).

This Court, as well as the lower courts, have often considered the question of who may consent to a search on behalf of another. *E.g., Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United States*, 365 U.S. 610 (1961); *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Martinez*, 450 F.2d 864 (8th Cir. 1971); *Anderson v. United States*, 399 F.2d 753 (10th Cir. 1968); *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962). The rules developed in this area are strictly enforced. *See, Stoner v. California, supra*, 376 U.S. at 488-89; Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 *Colum. L. Rev.* 130, 148-150 (1967); Note, *Effective Consent To Search And Seizure*, 113 *U. Pa. L. Rev.* 260, 272-77 (1964). The above cited authorities go to who can consent to a search; the question presented in this case is what constitutes a valid consent. Surely this Court will continue its close scrutiny

of the circumstances of third party consent cases, *see, Stoner v. California, supra; Chapman v. United States, supra*, while also continuing its close scrutiny of the content of the consent.[2]

The last of the petitioner's arguments is that "imposing a waiver requirement" (Pet. Br. 17) on California will lead to mandatory specific Fourth Amendment admonitions comparable to the Fifth Amendment admonitions required in *Miranda v. Arizona*, 384 U.S. 436 (1966).

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[2]The petitioner's brief asserts that the Court of Appeal for the Ninth Circuit has refused to apply the waiver criteria with respect to federal convictions (Pet. B. 15, 24). In two of the cited cases, the issue of knowledge was not raised in the proceedings, and in the third case the question considered was whether specific Fourth Amendment admonitions are required in addition to Fifth Amendment admonitions to validate a consent search. In *United States v. Novick*, 450 F.2d 1111 (9th Cir. 1971), the police were called by the owner of a house whose wife had attempted suicide. When the police inquired as to whether there were weapons on the premises which the wife might use in another suicide attempt, the owner told them that his house guest had a rifle in his room. The rifle proved to be an unregistered machine gun, and the court held that the police attempt to help the homeowner seek out weapons in his house which could be used in a suicide attempt did not constitute an unlawful search. The second cited case, *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971) involved an individual who had been forced to take part in the crime and who was "determined" to help the police find evidence against the defendant. She took the police to the apartment where she had lived with the defendant and she tried to direct the police to where the evidence might be found. She later testified as a government witness. The last of the cited cases, *United States v. Noa*, 443 F.2d 144 (9th Cir. 1971), held that where specific warnings are given as required under *Miranda v. Arizona, supra*, further specific Fourth Amendment warnings are not necessary to validate a consent search. It should also be noted that both *Cipres* and *Schoepflin* were federal cases.

Since there was no determination made as to whether Alcala knew of his Fourth Amendment rights, however, it is difficult to see how the application of long standing constitutional criteria for determining a waiver's validity will inexorably lead to required Fourth Amendment admonitions in all cases. It is true that a number of courts and commentators have suggested that law enforcement officials should be required to inform a person of his Fourth Amendment rights before obtaining authorization to conduct a warrantless search. *United States v. Miller*, 395 F.2d 116, 118 (7th cir. 1968), *cert. denied*, 393 U.S. 846 (1968); *United States v. Nickrasch*, 367 F.2d 740 (7th Cir. 1966); *United States v. Moderacki*, 280 F. Supp. 633 (D. Del. 1968); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Penn. 1966); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 *Colum. L. Rev.* 130 (1967); Note, *Effective Consent To Search and Seizure*, 113 *U. Pa. L. Rev.* 260 (1964); Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 *St. Louis U. L. J.* (1968). It is also true that law enforcement agencies may decide to give Fourth Amendment admonitions as a judgment of good police practices.[3] However, the question before the Court is California's unwillingness to apply long standing criteria for determining a waiver's validity, not whether specific Fourth Amendment admonitions are required in all cases. This Court may eventually decide that such warnings are required to ensure that Fourth Amendment rights are protected and

[3] Some federal law enforcement agencies, such as the Bureau of Narcotics and Dangerous Drugs, obtain prior written consent to searches, and the written form recites that the consenting person is aware of his constitutional right not to have the search made. (Federal Bureau of Narcotics and Dangerous Drugs Form 5-N)

enforced, *cf.*, *Miranda v. Arizona, supra*, but the respondent's arguments, and the Ninth Circuit Court of Appeals' decision are based upon existing authorities regarding waivers of constitutional rights.

Other courts have applied these authorities in the absence of specific admonitions. In *Rosenthall v. Henderson, supra*, the court affirmed the District Court's finding that the government failed to sustain its burden of proving that the consent to search was intelligently given:

> "The failure to advise the defendant of his right to withhold consent is only one factor to be considered. The failure to so advise might have more weight in one case than in another. To advise a person with experience or training in this field that he has the right to refuse consent would be a waste of words. To fail to so advise another, who by low mentality or inexperience is obviously ignorant of his rights, might in some cases be decisive. Other cases would doubtless fall between these two extremes." 389 F.2d at 516.

In *United States v. Curiale, supra*, the court upheld a consent search where the suspect told the law enforcement officer that "If I don't sign this [consent to search form], you are going to get a search warrant." 414 F.2d at 246. In considering the validity of Curiale's alleged consent, the court stated:

> "Curiale's statement concerning the search warrant demonstrated an awareness of his right to resist the agent's search in the absence of a warrant. Although he understood his right, he nevertheless chose to relinquish it." 414 F.2d at 747.

The fact is that all trial courts must now inquire as to the consenting person's knowledge of his rights, and they are doing so. California cannot refuse to follow established constitutional criteria because of its fearful view of the future.

E. *Bumper v. North Carolina* Did Not Affect The Requirement That Courts Must Determine Whether Consent To A Warrantless Search Was Given With Knowledge That It Could Be Withheld.

The petitioner's brief asserts that this Court impliedly approved California's test in *Bumper v. North Carolina*, 391 U.S. 543 (1968). This assertion ignores both the facts in that case as well as the lower court decisions which this Court cited therein.

In *Bumper*, the police officers went to the petitioner's house, and one of them told the petitioner's grandmother that they had a warrant to search the premises. The petitioner was not home, and his grandmother let the police search the house. No warrant was produced at the trial.

The prosecutor, in attempting to justify the search, sought to rely on the grandmother's consent rather than on the warrant. This Court responded as follows:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Bumper v. North Carolina, supra*, 391 U.S. at 550.

In *Bumper*, there was no question before the Court regarding knowledge of a constitutional right. The police,

by asserting that they had a warrant, coerced the suspect's grandmother into permitting the search, thereby making her awareness of her right to resist the search irrelevant; to quote the Court, the police announced "in effect that the occupant ha[d] no right to resist the search." Since the coercion was not based upon a lawfully issued warrant, the search itself was unlawful.

To the extent that there was "consent" to the search in *Bumper*, therefore, such consent merely constituted an intention to abide by the law and not resist a search purportedly authorized by a valid warrant; such consent was not an invitation to search. 391 U.S. at 549, n. 14. The case now before the Court involves the factual circumstance which was not considered in *Bumper*: a consent which, it is alleged, did constitute an invitation to search. Without a showing that such consent was given with knowledge that it could have been lawfully withheld, such consent could not have constituted a waiver of the constitutional right to resist the search.

The petitioner's assertion also ignores the lower court decisions cited favorably in *Bumper* which state that a consent search must constitute "an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution." *Bumper v. North Carolina, supra*, 391 U.S. at 549, n. 14 quoting from *United States v. Elliot*, 210 F. Supp. 357, 360 (D. Mass. 1962). Other cases cited in the Court's opinion include *Wren v. United States, supra; Simmons v. Bomar, supra; Judd v. United States, supra; Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931). All of those cases acknowledge that a consent to a warrantless search must be "freely *and intelligently* given." Although it is true that a valid consent can be given which would not be a suspect's optimum decision, it is

equally true that to be "intelligently given," the suspect's consent must be based upon his knowledge of the right he is relinquishing. Therefore, rather than impliedly approving California's test, this Court, in *Bumper*, reaffirmed the base criteria of Fourth Amendment waivers, which must be applied in all cases. California has adopted a rule which does not conform to those basic criteria, and this Court should declare that rule to be unconstitutional.

II.

THIS COURT SHOULD NOT ABANDON ITS EARLIER DECISIONS THAT FEDERAL HABEAS CORPUS IS AVAILABLE TO STATE PRISONERS SEEKING TO RAISE FOURTH AMENDMENT CLAIMS.

A. Introduction.

The petitioner's brief, as well as the brief submitted by the amicus curiae on behalf of the petitioner ("A.C. Br."), argue that Fourth Amendment claims should not be available to state prisoners seeking to invoke federal habeas corpus to gain their release from detention. In the first instance, both briefs present arguments against the exclusionary rule itself; arguments which must either assume that other remedies are available to vindicate Fourth Amendment claims, or that the Fourth Amendment should be viewed as little more than a pronouncement of high-minded ideals which the police may violate with impunity. For as Justice Murphy stated in his dissenting opinion in *Wolf v. Colorado, supra:*

> "Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is

blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

* * * *

"The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence." 338 U.S. at 41, 44.

The exclusionary rule has given rise to considerable controversey, but the rule does deter some improper police conduct. *See*, J. Skolnick, *Justice Without Trial*, 224-25 (Wiley & Sons, Inc. 1966). In addition, the exclusionary rule demonstrates the fundamental importance which this Court has attached to the Fourth Amendment. No other remedy currently exists which can accomplish these two functions. Even the most scholarly empirical criticism of the exclusionary rule concludes by stating that the exclusionary rule, despite its disadvantages, should be retained until an effective alternative exists which can take its place:

"If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary

rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule In Search And Seizure*, 37 *U. Chi. L. Rev.* 665, 756 (1970)

This Court has suggested that remedies in addition to the exclusionary rule, such as actions for monetary damages, may be available to victims of illegal searches and seizures, *see, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but questions remain as to the immunity from such suits of law enforcement officers acting in their official capacity. 403 U.S. at 397-98. Moreover, it is conceded that no current alternative remedy exists at this time which would justify abandonment of the exclusionary rule. *Id.* at 420-21 (Burger, C.J., dissenting)

To withhold federal habeas corpus relief from state prisoners seeking to invoke the exclusionary rule is, therefore, to foreclose the effective assertion of Fourth Amendment claims through collateral attack. Both the historical development of federal habeas corpus jurisdiction for state prisoners as well as current policy considerations justify the continuing availability of such relief for valid Fourth Amendment claims.

B. Federal Habeas Corpus Developed as an Effective Remedial Device To Ensure State Compliance with Evolving Notions of Due Process.

Other than a few minor exceptions, federal habeas corpus was first made available to state prisoners in the Habeas Corpus Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385). The act provided that:

> "[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ."

Historical data indicates that the Act was intended to extend federal habeas corpus power to the greatest extent possible. *See, Fay v. Noia, supra,* 372 U.S. at 415-17; *Townsend v. Sain,* 372 U.S. 293, 311-12 (1963).

Because the Supreme Court's appellate jurisdiction in habeas corpus cases was removed in 1868, and not restored until 1885, the first state prisoner case was not decided until 1886 when the Court ruled in *Ex Parte Royall,* 117 U.S. 241 (1886). In *Royall,* the Court stated that the federal courts' general grant of habeas corpus jurisdiction was "in language as broad as could well be employed." 117 U.S. at 247. The Court considered state-federal relationships in the context of the 1867 Act, and enunciated the "exhaustion of state remedies" doctrine. 117 U.S. at 252-53. Also, citing the then leading case of *Ex Parte Siebold,* 100 U.S. 371 (1879), the Court discussed the then prevailing theoretical underpinnings of habeas corpus relief, namely, that habeas corpus was available in cases where the court which tried the petitioner was without jurisdiction. Thus, if the convicting court lacked jurisdiction, the conviction itself was a nullity and habeas corpus would lie.

An extension of this "jurisdictional" approach was that habeas corpus would lie to review the constitutionality of the statute creating the offense. The basis of this theory was that a court which convicted the petitioner pursuant to an unconstitutional statute was without

jurisdiction: "the prosecution against [the defendant] has nothing upon which to rest, and the entire proceeding against [the defendant] is a nullity." *Ex Parte Royall, supra,* 117 U.S. at 248.

Many of the early decisions are difficult to reconcile today, but it appears that the basic approach was to consider whether a jurisdictional flaw could be detected in the trial proceedings. If such a flaw was detected, the resulting conviction was a nullity. On the other hand, if the case presented a question which the committing court was competent to consider, the committing court's decision was not collaterally attackable even if its decision was concededly erroneous. *See, in re Converse,* 137 U.S. 624 (1891). As time passed, it became increasingly difficult to explain habeas corpus decisions in terms of the approach of the early cases, yet references to "jurisdiction" continued for many decades. *See, Johnson v. Zerbst, supra,* 304 U.S. 465-68; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 *Harv. L. Rev.* 441, 478-83 (1963) (hereinafter cited as "*Bator*"); Note, *Developments in the Law–Federal Habeas Corpus,* 83 *Harv. L. Rev.* 1038, 1048-50 (1970) (hereinafter cited as "*Developments–Federal Habeas Corpus*").

Major developments in federal habeas corpus for state prisoners began with two cases which involved claims of mob-dominated trials: *Frank v. Mangum,* 237 U.S. 309 (1915), and *Moore v. Dempsey,* 261 U.S. 86 (1923). In *Frank v. Mangum,* the Court stated that federal habeas corpus would lie if there was an absence of jurisdiction at the outset of the state proceedings or if jurisdiction was "lost" during the course of the proceedings as a result of a mob-dominated trial. 237 U.S. at 327, 335. The Court emphasized that the due process clause of the Fourteenth Amendment (as that clause was construed in 1915) only required that the state courts give a fair hearing to the

defendant's claims regarding his federal rights, even if the state court's decision was erroneous. 237 U.S. at 326. On this basis, the court held that if the state applied a "corrective process," i.e., an appeal at which the defendant's claims could be considered, the facts as found at that appeal would be taken as setting forth the truth of the matter, and federal habeas corpus would not lie. 267 U.S. 335-36.

Eight years later the Court decided *Moore v. Dempsey, supra,* which repudiated *Frank v. Mangum's* conception that the mere fact that the petitioner had been given an opportunity to raise his federal constitutional claims in the State Supreme Court meant that he had been afforded due process of law. *See, Fay v. Noia, supra,* 372 U.S. at 420-21. In *Moore,* the Court ordered the District Court to investigate the facts of the petitioner's claim, and stated that:

> "But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." 261 U.S. at 91.

Although there are references in *Moore* to the adequacy of the state's "corrective process," the opinion clearly implies that the District Court must examine the facts for itself, for if those facts are true, the petitioner is entitled to relief. *Moore v. Dempsey,* therefore, was a substantial parallel development in federal habeas corpus jurisdiction as well as in the conception of the due process clause. The case has been viewed as a crucial

decision which not only dramatically changed the role of federal habeas corpus, but which also "gave birth to the modern aspect of due process." Reitz, *The Abortive State Proceeding*, 74 *Harv. L. Rev.* 1315, 1329 (1961).

Both cases constituted major developments in federal habeas corpus jurisdiction. In *Frank v. Mangum*, the Court made a new weapon available to the habeas corpus court: if the state courts failed to supply a corrective process to ensure fair consideration of the federal claim—whether or not jurisdictional—those questions could be investigated on federal habeas corpus to determine if the detention was lawful. *Bator, supra*, 76 *Harv. L. Rev.* at 486-87. *Frank v. Mangum*, thus, tentatively authorized the federal habeas corpus judge to look behind the bare record of the state proceedings. *Moore v. Dempsey* carried the law beyond *Frank v. Mangum* in that it specifically empowered the federal habeas corpus judge to consider the petitioner's federal claims even if they were passed upon by the state court. It is with *Moore v. Dempsey*, therefore, that the subtle shift took place from an inquiry into the adequacy of the state court's corrective process to an inquiry into the very issue of denial of due process. *Developments—Federal Habeas Corpus, supra*, 83 *Harv. L. Rev.* 1038, 1052-53. *See also, Peyton v. Rowe*, 391 U.S. 54, 59-60 (1968).

The "jurisdictional" approach began to wane with *Moore v. Dempsey*, but 15 years later it was still used in *Johnson v. Zerbst, supra*. In that case the Court held that failure to comply with the Sixth Amendment's guarantee of right to counsel resulted in the convicting court "losing" jurisdiction during the course of the trial. *Johnson v. Zerbst, supra*, 304 U.S. at 467-68. In *Waley v. Johnston*, 316 U.S. 101 (1942), the Court abandoned the jurisdictional approach entirely in a case dealing with an alleged coerced confession.

In 1953, this Court decided *Brown v. Allen*, 344 U.S. 443 (1953), and specifically affirmed that federal habeas corpus is available to state prisoners seeking to raise all federal constitutional claims. Acknowledging that the federal habeas corpus judge is to consider the state court findings, the Court stated that:

> "[N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 344 U.S. at 508 (Frankfurter, J. speaking for five justices)

In a later decision, this Court reiterated that the rule set forth in *Brown v. Allen* is the reaffirmance of the basic purpose of the Habeas Corpus Act of 1867, namely:

> "to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees." *Fay v. Noia, supra,* 372 U.S. at 416; *See also,* 372 U.S. at 415-26.

The development of federal habeas corpus jurisdiction over the last century has, in many respects, tracked the development of the due process clause of the Fourteenth Amendment. As the concept of due process rights has expanded, the scope of federal habeas corpus has expanded to provide the remedy to vindicate those rights.[4] *See, Fay v. Noia, supra,* 372 U.S. at 401-02;

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[4]The increasing use of federal habeas corpus has also, in part, been due to the abandonment of the system of prison censorship which bottled up many petitions. Schaefer, *Federalism and State Criminal Procedure*, 70 *Harv. L. Rev.* 1, 21 (1956) (hereinafter cited as *"Schaefer"*).

Sokol, *Federal Habeas Corpus* 18-21 (Michie Co. 1969); *Developments–Federal Habeas Corpus, supra,* 83 *Harv. L. Rev.* at 1048-52. The argument that federal habeas corpus is now different in scope and function from what habeas corpus was in 1915, 1867 or 1700 (A.C. Br. 5-13) misses an essential point: The scope and function of the writ cannot be artificially crystallized and frozen out of the stream of time (Sokol, *Federal Habeas Corpus* 19-20 (Michie Co. 1969)). The writ has never been

> "a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose–the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham,* 371 U.S. 236, 243 (1963).

As this Court has resisted attempts to turn back the developments under the Fourteenth Amendment, so too has it resisted attempts to curtail federal habeas corpus jurisdiction. Only three years ago this Court, in *Kaufman v. United States, supra,* rejected arguments with respect to federal prisoners which are identical to those arguments being presented in this case with respect to state prisoners.[5] In *Kaufman,* this Court confirmed that both federal and state prisoners may avail themselves of federal habeas corpus to raise Fourth Amendment claims. Moreover, with particular regard to state prisoners, this Court stated that:

> "The Government concedes in its brief that we have already rejected this approach [excluding search and seizure claims] with respect to the

[5]Even those commentators who argue for distinctions between state and federal prisoners concede that, while limitations on federal habeas corpus might be appropriate for federal prisoners, such limitations should not be applicable to state prisoners. *See,* Amsterdam, *Search, Seizure, And Section 2255: A Comment,* 112 *U. Pa. L. Rev.* 378, 379-82 (1964).

availability of the federal habeas corpus remedy to state prisoners. This rejection was premised in large part on a recognition that the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake. Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. (citing cases)" 394 U.S. at 225.

Circumstances have not changed during the past three years to justify overruling *Kaufman v. United States* and the historical development of federal habeas corpus jurisdiction which it represents. Rather, the same reasons which have always justified federal habeas corpus for state prisoners seeking to raise Fourth Amendment claims remain fully valid today.

C. Federal Habeas Corpus for State Prisoners Seeking To Raise Fourth Amendment Claims Is Necessary To Ensure Fair and Equal Treatment to All Citizens.

Federal habeas corpus jurisdiction is based upon the need for a separate proceeding, insulated from an inquiry into the defendant's guilt, to protect his constitutional rights. *Developments—Federal Habeas Corpus, supra,* 83 *Harv. L. Rev.* at 1057. Local interest as well as the trial court's primary function are concerned with the guilt-innocence determination. This is not to say that the trial court judges are unwilling to abide by constitutional requirements, but, as a distinguished State Supreme Court Justice has stated:

"[E]ven though [certain procedural] requirements come with the ultimate sanction of a constitutional command . . . it is not always easy to focus upon the procedural requirement and shut out considerations of guilt or innocence." *Schaefer, supra,* 70 *Harv. L. Rev.* at 13; *See also, Id.* at 5.

Counterpoised to this direct focus on the guilt-innocence determination is only the general notion of due process. History has shown that the protection and vindication of the accused's due process rights often requires a separate proceeding removed in time and place from the passions of the actual trial:

"It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely . . . . Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty . . . . Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." *Fay v. Noia, supra,* 372 U.S. at 401-02; *See also, Schaefer, supra,* 70 *Harv. L. Rev.* at 5-6.

The availability of federal habeas corpus for state prisoners is also premised on the notion that there is an interest in having federal constitutional claims considered in a federal court. *Developments—Federal Habeas Corpus, supra,* 83 *Harv. L. Rev.* at 1060; *See also, Brown v. Allen, supra,* 344 U.S. at 498-500, 508-13 (Frankfurter, J., speaking for five justices). The state courts, even though following fair procedures, may nevertheless, misconceive a federal constitutional right, and federal habeas corpus

has proven to be the most effective remedy available to vindicate those rights.

The arguments against federal habeas corpus jurisdiction are based upon the asserted social benefits of swift and certain punishment (A.C. Br. at 17), and the correlative need for finality in criminal proceedings. The benefits of swift, immediate punishment are conjectural, at best. Moreover, restricting an individual's opportunity to assert that his detention is the result of illegal conduct by the police is hardly calculated to foster respect for the law, especially in an era when too many citizens view governmental law enforcement activities as oppressive of rather than as protective of their rights and interests. *Cf.*, Freund, *Remarks at Symposium on Federal Habeas Corpus*, 9 *Utah L. Rev.* 27, 30 (1964).

The major alleged justification for finality is that it is futile to seek "ultimate truths," and that it should be enough if the state courts fairly considered the defendant's federal constitutional claims, subject to the possibility of direct review by this Court. *Bator, supra*, 76 *Harv. L. Rev.* at 441-53. Since 1916, however, direct appeals by state prisoners have been available only in cases involving the constitutionality of a statute. Other constitutional claims, such as alleged denials of due process, are directly reviewable only on certiorari. 28 U.S.C. §1257. Many petitions for certiorari are prepared without the aid of counsel, and the large number of such petitions as well as the Court's general case load prevents access to certiorari from being "a normal appellate channel in any sense comparable to the writ of error." *Fay v. Noia, supra*, 372 U.S. at 436; *See also* Hart, *Forward: The Time Chart for the Justices, the Supreme Court, 1958 Term*, 73 *Harv. L. Rev.* 83 (1959). There-

fore, state prisoner claims regarding federal constitutional protections, including Fourth Amendment protections, can only be subjected to systematic federal court review through the use of federal habeas corpus.

The real question is whether the state's interests in finality outweighs the citizen's right to seek vindication of his federal constitutional rights. This is a judgment which this Court has carefully made on many occasions in the past in cases involving federal habeas corpus:

> "The approach adopted by the [lower] court . . . and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay v. Noia, supra,* at 424, a case involving a state prisoner who claimed that his confession was coerced, we said that 'conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.' The same view was expressed in *Sanders v. United States* [373 U.S. 1, 8 (1963)], a case involving a federal prisoner: '[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.' This philosophy inheres in our recognition of state prisoners' post-conviction claims of illegal search and seizure." *Kaufman v. United States, supra,* 394 U.S. at 228.

The petitioner's brief and the brief of the amici curiae contend that the pending case is an example of the "unsoundness" of existing procedures (Pet. Br. at 30;

A.C. Br. at 18-19). On the contrary, this case provides ample evidence of the merits of existing procedures, and the dangers inherent in abandoning them.

Mr. Bustamonte objected to the introduction of the evidence resulting from the challenged search at his trial (App. 39-47), at the appeal to the California Court of Appeal (*People v. Bustamonte, supra*) and in his petition for a hearing to the California Supreme Court. At each level of the state proceedings, his objection was rejected on the basis of California's rule that lack of knowledge of Fourth Amendment rights has no bearing on the validity of a consent search; a rule which is contrary to the fundamental constitutional criteria enunciated by this Court (see Part I, *supra*).

After the California Supreme Court denied the petition for rehearing, Mr. Bustamonte filed a petition for a writ of habeas corpus in the U.S. District Court, a petition which he prepared without the aid of counsel. Only when the District Court's denial of the petition was appealed to the U.S. Court of Appeals for the Ninth Circuit did Mr. Bustamonte have an opportunity to present his federal constitutional claim, with the aid of counsel, to a court unfettered by California's erroneous rule. That it took

That it took three years and five months to have Mr. Bustamonte's rights vindicated was not due to delays on his part. On the contrary, Mr. Bustamonte's every desire was to be freed from his detention as soon as possible. That eleven California judges chose to abide by California's rule is understandable and to be expected in view of the California courts' narrow perception of the Fourth Amendment (See Part I, *supra*), and that a federal judge may have had a petition before him which did not fully set forth Mr. Bustamonte's claims should not reflect unfavorably on Mr. Bustamonte since he was then

impoverished and unable to obtain counsel to assist in the preparation of the petition.

Mr. Bustamonte has, therefore, promptly pursued those remedies which were available to him. He has exhausted all state remedies to no avail, and it has been left to the federal courts to vindicate his federal constitutional rights.

To withhold federal habeas corpus from Mr. Bustamonte and other state prisoners seeking to invoke the exclusionary rule would be to roll back the protections of the Fourth Amendment heretofore available to citizens tried in state courts. Without access to federal habeas corpus, it is unlikely that Mr. Bustamonte would ever have had an opportunity to challenge California's consent search rule in a federal court. To single out the Fourth Amendment's protections from among the provisions of the Bill of Rights applicable to the states, and to hold that such protections cannot be vindicated on federal habeas corpus, would end the careful, consistent review which the federal courts have been able to accord to Fourth Amendment questions. A review of the decisions of this Court resulting from prisoner federal habeas corpus applications raising Fourth Amendment questions stands as testimony to the need for such a remedy to guarantee full and fair protection of those rights. *See, Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).

Whether a state intentionally or inadvertently establishes an erroneous rule regarding the Fourth Amendment's protections, the result for the accused citizen whose rights are thereby violated is the same; he is imprisoned. The Constitution, the Congressional enact-

ments regarding federal habeas corpus and the decisions of this Court have not in the past, and should not now, permit that result. Federal habeas corpus for state prisoners is not a search for unattainable "ultimate truths;" rather it is a commitment to protect the constitutional rights of all citizens and to strive for equal treatment for all state prisoners seeking to raise federal constitutional claims. The benefits of the remedy are not a function of the relative quality or integrity of state judges versus federal judges, but a recognition that federal judges, with exclusive allegiance to this Court's pronouncements on fundamental constitutional questions, are institutionally free from the potentially erroneous and inconsistent decisions of the 50 state supreme courts. To this extent then, federal habeas corpus jurisdiction for state prisoners is an effective remedy to obtain "right" decisions; decisions which guarantee that the fundamental constitutional criteria set forth by this Court are fairly and equally applied to all citizens in all states.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests this Court to affirm the decision of Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES CITED IN RESPONDENT'S BRIEF

1. **Fourth Amendment, U.S. Constitution.**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. **Section 1, Fourteenth Amendment, U.S. Constitution.**

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. **Habeas Corpus Act of 1867 (Act of February 5, 1867, ch. 28 § 1, 14 Stat. 385.)**

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all

cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be

amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal,

and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void."

4. 28 U.S.C. §1257.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

5. 28 U.S.C. § 2254.

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is

admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 732

MERLE R. SCHNECKLOTH, Superintendent, California Conservation Center, *Petitioner,*

vs.

ROBERT CLYDE BUSTAMONTE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center, *Petitioner,*

vs.

ROBERT CLYDE BUSTAMONTE, *Respondent.*

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

CLOSING BRIEF FOR THE PETITIONER

INTRODUCTORY STATEMENT

Respondent Bustamonte appears to concede that if the California rule for judging consent searches is constitutionally acceptable then the consent search which turned up the three checks admitted into evidence against him was valid. Also, by agreeing with our statement of the facts, Bustamonte has focused the argument squarely upon the legal issues presently before the Court.

ARGUMENT

I

CALIFORNIA'S RULE FOR JUDGING CONSENT SEARCHES IS CONSTITUTIONALLY ACCEPTABLE

The heart of Bustamonte's first argument—as well as the core error of the Ninth Circuit—is his identification of consent searches with the waiver of rights conferred by the Fifth and Sixth Amendments. See *Boykin v. Alabama,* 395 U.S. 238 (1969); *McCarthy v. United States,* 394 U.S. 459 (1969); *Miranda v. Arizona,* 384 U.S. 436 (1966); *Carnley v. Cockran,* 369 U.S. 506 (1962); *Johnson v. Zerbst,* 304 U.S. 458 (1938). This argument fails because the nature of the right conferred by the Fourth Amendment is fundamentally different from the rights conferred by the Fifth and Sixth Amendments. "The Fourth Amendment is not absolute in its terms." *United States v. United States District Court,* 40 U.S.L.W. 4761 (June 19, 1972). And, "it must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." *Elkins v. United States,* 364 U.S. 206, 222 (1960). (Emphasis added.) On the other hand, the Fifth Amendment does not guarantee security from unreasonable compulsory self-incrimination, but from all such incrimination. Neither does the Sixth Amendment say that the accused in a criminal case shall have the assistance of counsel or a jury trial when it is reasonable under the circumstances.

That the Fourth Amendment is couched in terms of reasonableness militates against a subjective waiver

standard and in favor of an objective standard for assessing the voluntariness of consent searches. The proper rule for assessing consent searches was recently set forth by the California Court of Appeal in *People v. Tremayne,* 20 Cal.App.3d 1006, 98 Cal.Rptr. 193 (1971). In that case the defendant, challenging a consent search argued that consent to search is to be judged by the standard applicable to the waiver of the right to remain silent, *i.e.,* a showing that he had been warned of the right and expressly waived it. The court rejected this argument as based upon the false premise that in consenting to a search, defendant was waiving a constitutional right. The court explained:

> "The purpose of the Fourth Amendment is to secure the privacy of people against unreasonable invasion by the police.
>
> . . . .
>
> "Consent to a search confers authority to search; establishes the reasonable nature of a search premised thereon; **is not a waiver of a** constitutional right; and is effective without warning the person giving the consent he might refuse to consent.
>
> "The real issue at bench is whether defendant freely and voluntarily consented to a search of his residence, and not whether he waived his constitutional right to be protected against an unreasonable search. Consent obtained by fraud or coercion, including submission to an express or implied assertion of authority, is not free and voluntary, and has no legal effect. (*People v. Shelton,* 60 Cal.2d 740, 746 [36 Cal.Rptr. 433,

> 388 P.2d 665]; *People v. Roberts, supra,* 246 Cal. App.2d 715, 727). The California rule recognizes the fact a person consenting to a search was not warned he had the right to refuse to consent is a circumstance to be considered in determining whether his consent was free and voluntary. [Citation.]" *Id.* at 1015-16, 98 Cal.Rptr. at 198.

As noted in *Tremayne,* California recognizes that a defendant's knowledge of his right to refuse to consent is a circumstance to be considered in determining whether his consent was free and voluntary, but it is not determinative of the issue. This aspect of California's consent search rule was also pointed out in our opening brief. Brief for Petitioner, p. 9. California's approach parallels that followed by this Court prior to *Miranda* in assessing the voluntariness of confessions, *i.e.,* "low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. [Citations]" *Procunier v. Atchley,* 400 U.S. 446, 453-54 (1971). Thus, it is startling that respondent has at five separate points in his brief wrongly characterized California's rule as making the consenting party's knowledge of his right to refuse a search irrelevant. Respondent's Brief, pp. 4, 8, 11, 13, 33. Under California law, knowledge is relevant but it is not determinative. To make it so would cause the reasonableness of governmental action under the Fourth Amendment to turn entirely on the affected party's state of mind.

Respondent attempts to avoid our argument that adoption of a waiver standard would make valid third party consent searches virtually impossible, even though this Court has repeatedly held that a third party can consent to the search of a suspect's property. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Frazier v. Cupp,* 394 U.S. 731 (1969); *Abel v. United States,* 362 U.S. 217 (1960); see also Brief for Petitioner, pp. 14-17. Respondent attempts to distinguish these authorities as bearing only upon the question of who can consent to a search rather than what is necessary to constitute valid consent. Brief for Respondent, p. 14. To the contrary, the very fact that one can consent to a search of someone else's property demonstrates that consent searches are fundamentally different from the waiver of personal rights. It is inconceivable that this Court would countenance the waiver by a third party of a suspect's *Miranda* rights or his right to counsel in a criminal prosecution, or permit a third party to enter a plea of guilty for a defendant (*Cf. Boykin v. Alabama,* 395 U.S. 238 [1969]).

The fundamental difference between the subjective waiver standard applied to Fifth and Sixth Amendment rights and the objective standard used to judge the validity of a consent search is sharply illustrated by two recent cases. In *United States v. Elrod,* 441 F.2d 353 (5th Cir. 1971), a consent search was held invalid when the defendant, on motion to suppress evidence, came forward with proof that his codefendant, who had consented to the search, had a history

of mental illness and had been found incompetent to stand trial. The court, applying the subjective waiver standard, stated:

> "Presumably it is a lamentation that to the burdens which now almost make a constitutional seer out of a policeman on that beat will be added the esoteric functions of an amateur psychiatrist. No matter how genuine the belief of the officers is that the consenter is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed." 441 F.2d at 356.

This approach totally disregards the purpose of the exclusionary rule by excluding probative evidence obtained in good faith by law enforcement officers who reasonably believed that the consenting party had the capacity to give consent.

A far more practical approach, and one in conformity with the purposes of the exclusionary rule, was adopted by the California Court of Appeal in *People v. Gurley*, 23 Cal.App.3d 536, 100 Cal.Rptr. 407 (1972). In that case the court held that the defendant, who at the time in question was under the influence of an injection of heroin and in something of a state of shock owing to the death of his wife from an overdose of that drug, could still give a valid consent to search his automobile. The court reached this conclusion upon the following analysis:

"The reasons supporting the Fourth Amendment exclusionary rule are: (1) 'to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard' [citation]; and (2) 'the imperative of judicial integrity' [citation]. In the situation where the officers act reasonably on the evidence before them (here the ostensibly rational statements of the defendant, although he may subsequently be found to have been irrational), the exclusion of the evidence seized with his apparent consent will not prevent similar conduct in the future under similar conditions.[5] [footnote omitted] No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future.

"The imperative of judicial integrity cannot be decisive in these circumstances. It can merely categorize a result which must be founded on other criteria. If the search is valid because the officers acted reasonably the court need not be embarrassed in admitting the evidence. If, however, the reasons of policy dictate that the evidence should be excluded to protect the right of privacy . . . integrity would require exclusion.

"Despite the similarity of approach which has been noted above, it is generally recognized that the exclusionary rules under the Fourth and Fifth Amendments involve some different considerations.

"In *United States v. Harris* (1971) 403 U.S. 573, ... [29 L.Ed.2d 723, 730, 91 S.Ct. 2075] the court quoted from *United States v. Ventresca* (1965) 380 U.S. 102, 108 [13 L.Ed.2d 684, 689,

85 S.Ct. 741] as follows: ' "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract." ' In *Hill v. California* (1971) 401 U.S. 797, ... [28 L.Ed. 2d 484, 490, 91 S.Ct. 1106], the court affirmed a decision of the Supreme Court of this state which upheld a search of the premises of the defendant which had taken place there in connection with the arrest of an occupant who mistakenly, but reasonably, was believed to be the accused. It stated, 'When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," Brinegar v. United States, 338 U.S. 160, 175, 93 L.Ed. 1879, 1890, 69 S.Ct. 1302 (1949), the arrest and subsequent search was reasonable and valid under the Fourth Amendment.' (401 U.S. at p. ..... [28 L.Ed.2d at p. 490].)

"In *People v. Hill* (1968) 69 Cal.2d 550 [72 Cal.Rptr. 641, 446 P.2d 521], the Supreme Court of this state had recognized the rule in this state to be as follows: 'Although sometimes criticized, the rule that a search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search has been regularly reaffirmed.' [Citations.] In *Hill* the state court concluded, 'In summary, we hold that the reasonable but mistaken beliefs of the police did not render their conduct unreasonable in a constitutional sense. Mistaken identity does not negate probable cause to arrest, and a search based on a valid but mistaken arrest is not unreasonable as an unwarranted invasion of either

the arrestee's or the defendant's privacy.' (69 Cal.2d at p. 555.)

. . . .

"It may further be noted that in this state it is not necessary to admonish the suspect, or occupant of property, as was in fact done in this case, that he has a right to refuse to consent to the search. [Citations.] It has also been noted that in the absence of fraud, ruse or subterfuge employed by the officers, the fact that the accused may have been under a subjective misapprehension as to the officer's intent will not invalidate his consent. (See *People v. Superior Court* (1969) 271 Cal.App.2d 524, 529 [76 Cal. Rptr. 518]; and *People v. Hale* (1968) 262 Cal. App.2d 780, 787 [69 Cal.Rptr. 28].)

"The foregoing precedents indicate that an objective standard should be used in determining whether there has been a valid consent to search, even when that consent emanates from an accused who later establishes, upon facts not readily apparent to the officers, that he was not in full possession of his faculties at the time. This conclusion is supported by the fact that if the invalidity of the consent can only be established later, it is then generally too late to secure a search warrant or take such other steps as might have been taken to secure and seize the contraband, loot or evidence, had consent been refused." *Id.* at 553-555, 100 Cal.Rptr. at 418-420.

In conclusion, we adhere to our position that consent to search is to be judged by an objective standard and that standard when applied to this case shows that Alcala's consent to search the Ford was validly given.

II

QUESTIONS RELATING TO SEARCH AND SEIZURE HAVING NOTHING TO DO WITH THE GUILT OR INNOCENCE OF THE DEFENDANT SHOULD NOT BE COGNIZABLE ON COLLATERAL ATTACK

Respondent commences his argument on the second issue in this case with an apologia for the exclusionary rule in its present form. However, the intrinsic merits of the exclusionary rule itself are not before the Court in this case. Similarly, when respondent takes pains to survey the expansion of federal habeas corpus since 1867 and argues that such expansion is both historically justified and beneficial today, he raises broader issues than are necessary to the resolution of this case. The historical arguments about expansion of the writ to allow collateral attack on criminal judgment (*compare Fay v. Noia,* 372 U.S. 391, 415-428 [1963] *with* P. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441 [1963]; *Fay v. Noia, supra,* 372 U.S. at 449-460, dissenting opinion of Harlan, J.) need not determine the issue here.[1] What we do urge is simply that the impact of the federally mandated exclusionary rule upon a state's criminal justice system ought to be tailored to the purposes sought to be served by that rule.

It may be assumed for purposes of argument that the application of the exclusionary rule at the trial and direct review stages of state criminal proceed-

[1]We do note, however, that compelling arguments have been made against the historical assumptions that underlay the majority opinion in *Noia. See, e.g.* D. Oakes, *Legal History in the High Court—Habaes Corpus,* 64 Mich. L. Rev. 451 (1966).

ings has some effect on the conduct of law enforcement officers. *Cf.* D. Oakes, *Studying the Exclusionary Rule in Search and Seizures,* 37 U. Chi. L. Rev. 665 (1970). But it is totally unrealistic to assume that the deterrent affect of the exclusionary rule on the average police officer will be any greater if he realizes that in addition to the remedies available at trial and on appeal the defendant has an additional right to challenge the admissibility of the evidence in the federal courts years after the state conviction has become final. The availability of adequate process in the state trial and appellate courts for the assertion of the exclusionary rule, together with the possibility of direct review in this Court, is a sufficient deterrent to illegal searches. This Court ought not to impose additional burdens on the already overtaxed state criminal justice system where the possibility of additional benefits in the form of further deterrence is nonexistent. *Cf. Harris v. New York,* 401 U.S. 222, 285 (1971).

That the exclusionary rule does not go to the integrity of the fact-finding process is well documented in the opinions of this Court. *Williams v. United States,* 401 U.S. 646, 653 (1971); *Desist v. United States,* 394 U.S. 244 (1969); *Linkletter v. Walker,* 381 U.S. 618 (1965). Thus, rejection of collateral attack on search and seizure claims involves no risk that an innocent man will remain imprisoned. In this connection it is worth noting that this Court has already insulated from federal habeas corpus review claims going to search and seizure and police interrogation methods in cases where the defendant has en-

tered a voluntary plea of guilty. *McMann v. Richardson,* 397 U.S. 742 (1970). This Court has observed that between 90 and 95 percent of all criminal convictions and between 70 percent and 85 percent of all felony convictions are by guilty plea (*Brady v. United States,* 397 U.S. 742, 752 n. (1970)). Can it be said that allowing collateral attack on search and seizure grounds in the remaining small percentage of cases that go to trial will have any real effect on the day to day performance of police work?

Further, despite the contrary hope expressed in *Fay v. Noia, supra,* 372 U.S. at 437, it is doubtful that the availability of collateral attack in the federal district courts on search and seizure grounds has had any appreciable effect in reducing the number of certiorari petitions in this Court's docket. It is unrealistic to assume that litigious prisoners will pass up any opportunity for the relitigation of their constitutional claims. In fact the availability of federal habeas corpus has given these prisoners an additional opportunity to seek ceritorari from this Court, first after direct review in the state courts and again after an adverse decision from the federal appellate courts.

Respondent contends, however, that federal habeas corpus review on Fourth Amendment claims is necessary to insure fair and equal treatment to all citizens. Brief for Respondent, p. 29. This argument necessarily assumes that state courts, particularly state appellate courts, cannot be trusted to adhere to constitutional requirements unless the federal district

courts stand by to review their decisions. We propose three separate answers. First, in *Ker v. California,* 374 U.S. 23 (1963), this Court declared that once the fundamental criterion of reasonableness is met, the states are free to develop workable rules governing arrests, searches and seizures to meet the practical demands of effective investigation and law enforcement under the varying conditions and circumstances that exist in the different states. 374 U.S. at 34. Second, Congress, by enacting section 2254(d), clothed with a presumption of correctness findings of the state courts on constitutional questions once procedural due process requirements are satisfied, thus evidencing a measure of confidence in the state courts to adjudicate constitutional questions. Third, lack of confidence in the state courts has led to the situation where

> "Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining and reexamining of state criminal judgments for possible constitutional error. The protection of constitutional rights is the cornerstone of our system of criminal justice, but are the state judicial systems so weak, so inadequate as to require discarding all the traditional principles of *res judicata* and estoppel? No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments." G. Doub, *The Case Against*

Modern Federal Habeas Corpus, 57 A.B.A.J. 323, 326 (1971).

Actually, respondent has verified our claim that collateral attack on Fourth Amendment grounds can be justified only if the interest of the states in maintaining the finality of criminal judgments is totally disregarded. He asks this Court to discount that interest. But finality in the criminal law is an end which must always be kept in plain view. *Mackey v. United States,* 401 U.S. 667, 690 (1971), concurring opinion of Harlan, J.; see also H. Friendly, *Is Innocence Irrelevant, Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 146-151 (1970).

Rejection of collateral attack on state convictions on Fourth Amendment grounds carries with it absolutely no risk that an innocent person will be held in custody in violation of his constitutional rights. Neither will it substantially affect police practices. What it will do is free the limited resources of the federal courts and the states for more productive work.[2]

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[2] "Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community —judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. Today of all times we should be conscious of the falsity of the bland assumption that these are in endless supply.[26] Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial.[27] The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases. To say we must provide fully for both has a virtuous sound but ignores the finite amount of funds available in the face of competing demands." [Footnotes omitted.] Friendly, *op. cit. supra,* pp. 148-149.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals should be reversed.

Dated, October 2, 1972.

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